

# Exhibit A

*Briseño v. Conagra Foods, Inc.,*  
No. CV 11-05379-CJC (AGRx) (C.D. Cal.)

**Response and Opposition to Objector's Motion for Sanctions**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

ROBERT BRISENO,	)	
	)	
Plaintiff,	)	<b>Certified Transcript</b>
	)	
vs.	)	Case No.
	)	2:11-cv-05379-CJC-AGR
CONAGRA FOODS, INC.,	)	
	)	
Defendant.	)	
	)	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
MOTION HEARING  
MONDAY, OCTOBER 7, 2019  
1:42 P.M.  
LOS ANGELES, CALIFORNIA

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1                   **LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 7, 2019**

2                                   **1:42 P.M.**

3                                   - - -

4                   THE COURTROOM DEPUTY:   Calling Item Number 3,  
01:42PM 5   CV 11-05379-CJC, *Robert Briseno vs. Conagra Foods, Inc.*

6                   Counsel, please state your appearances.

7                   MS. TADLER:   Ariana Tadler of Tadler Law on behalf  
8   of the plaintiffs.

9                   THE COURT:   Hello, Ms. Tadler.

01:42PM 10          MR. LEVITT:   Good afternoon, Your Honor.   Adam  
11   Levitt on plaintiffs' behalf.

12                  THE COURT:   Hello, Mr. Levitt.

13                  MS. KELLER:   Good afternoon, Your Honor.   Amy Keller  
14   also on behalf of plaintiffs.

01:42PM 15          THE COURT:   Hello, ma'am.

16                  MR. AZAR:   Good afternoon.   David Azar on behalf of  
17   the plaintiffs.

18                  THE COURT:   Hello, sir.

19                  MS. DE BARTOLOMEO:   Good afternoon, Your Honor.  
01:42PM 20   A.J. De Bartolomeo on behalf of the plaintiffs.

21                  THE COURT:   Hello, ma'am.

22                  MS. SPIVEY:   Angela Spivey with Alston & Bird on  
23   behalf of Conagra Brands.

24                  THE COURT:   Hello, ma'am.

01:43PM 25          MS. SPIVEY:   Hello.

1 MR. FRANK: Theodore Frank on behalf of the objector  
2 Todd Henderson.

3 THE COURT: Hello, Mr. Frank.

4 All right. Well, I went through all the parties'  
01:43PM 5 briefings, and hopefully you received the tentative order. So  
6 I don't know if there's anything the plaintiffs' counsel or the  
7 defendant's counsel want to say before we turn it over to  
8 Mr. Frank, because I assume he disagrees with the tentative.

9 MR. LEVITT: Good afternoon, Your Honor. Adam  
01:43PM 10 Levitt, once again, on plaintiffs' behalf. As we had this  
11 conversation -- or last time here, the first time I was in  
12 front of the Court -- I occasionally stutter when I speak.  
13 It's not a problem for me; it shouldn't be for you.

14 THE COURT: It is not.

01:43PM 15 MR. LEVITT: If anything I say isn't entirely clear,  
16 please let me know, and I'll go right back over it.

17 THE COURT: I'll do that.

18 MR. LEVITT: So having just received the tentative  
19 and reviewed it, as I learned as a very young lawyer, when the  
01:44PM 20 wind's at your back, I shouldn't say a whole lot. So I won't  
21 at this point.

22 I simply wanted to say, as Your Honor is aware --  
23 and Your Honor came to this about 80 percent of the way in --  
24 it's been a long road. We filed this case back in 2011. I was  
01:44PM 25 saying to my colleagues last night, when we filed it, my son

1 was less than a year old, and now he's almost five feet tall,  
2 which is crazy by itself.

3 But that being said, as Your Honor saw from our  
4 papers and just a review of the record in this case, this was a  
01:44PM 5 fight for eight years. We changed the law on ascertainability  
6 in the Ninth Circuit. We fought on multiple rounds of motions  
7 to dismiss four separate motions to preempt or otherwise stay  
8 our case on primary jurisdiction grounds. We prevailed over  
9 all of them.

01:45PM 10 We went through two separate rounds of class cert.  
11 And after everything -- and then after a court-appointed  
12 mediator in -- with the expert help of Magistrate  
13 Judge McCormick, we reached a settlement for the proposed  
14 class -- or actually the certified classes that gave them 136  
01:45PM 15 percent of what they could have gotten at trial for their  
16 monetary damages. We set up a separate fund for a couple of  
17 states that had prospective statutory damage claims. And for  
18 all of that, after that, we ultimately -- once we got all the  
19 relief we could get for the -- for our classes, a larger amount  
01:45PM 20 than we could have gotten at trial, we ultimately accepted a  
21 mediator's recommendation, after multiple rounds of hard-fought  
22 mediation and separate conversations afterwards, of about 50  
23 percent of our fees.

24 And unlike lots of other cases where some  
01:46PM 25 plaintiffs' lawyers -- nobody here settles cases early

1 after -- without fighting. And I'm sure we'll hear about that  
2 in a little bit. We fought this case every step of the way.  
3 We got 11 statewide classes certified in a somewhat hostile  
4 climate for these kinds of cases and class certificates. So we  
01:46PM 5 won at every stage of this case.

6 And then, after all that, the reward we get for that  
7 is having to accept a fee of about half of what we actually put  
8 into this case. But the reason we did that is that, once we  
9 got as much as we could ever get for the class members, at the  
01:47PM 10 end of the day, there was nowhere else to go. We had to accept  
11 a fee because we were done. We did our job. There wasn't  
12 anything more we could get.

13 So rather than put the interest of the class members  
14 at risk and risk getting a lower amount at trial -- and as  
01:47PM 15 Your Honor points out in the tentative, there are risks in  
16 every case. And as Your Honor pointed out a number of times,  
17 there were lots of risks here -- rather than roll the dice on  
18 that and put the interest of the class at risk, which we would  
19 never do, it was time to call it a day, accept the mediator's  
01:47PM 20 recommendation to settle this case.

21 So as a result of all of that, I'm going to reserve  
22 any time that I have to respond to anything that Mr. Frank may  
23 say about the settlement.

24 And one thing -- one question I had for you in the  
01:48PM 25 tentative on page 6 and page 13 of the tentative, you referred

1 to a management problem. I'm going to guess that you meant a  
2 manageability problem under Rule 23, but I don't want to assume  
3 anything. So if I could ask Your Honor if that's what  
4 Your Honor meant or if there's another sort of management  
01:48PM 5 problem that Your Honor was thinking was happening in this  
6 case.

7 THE COURT: I will try to be as specific as I can.  
8 And then if you want further clarification, please do so.

9 When I was listening to your argument -- obviously,  
01:48PM 10 if you look at my order, I agree with everything you said. But  
11 I would highlight two factors about this settlement. I thought  
12 the plaintiffs' counsel did a great job. And I say that  
13 because I looked at this case -- although I view the principle  
14 of advertising being accurate and marketing being accurate as  
01:49PM 15 very important, I just looked at this case -- and I think much  
16 differently than Judge Morrow did because I'm not so sure I  
17 would have certified any class. I think you had significant  
18 problems with proving causation and damages.

19 Now, with respect to damages, as long as your  
01:49PM 20 formula applies to everybody, that shouldn't be grounds to  
21 decertify a class. But it's really wrapped into causation.  
22 How are you going to prove at this point people bought an item  
23 based on a representation that was made years ago, you know, by  
24 picking a product off a shelf? I just think it's very, very  
01:50PM 25 difficult.



1 To your point specifically, or your question,  
2 "management" is exactly what is the Rule 23. As a trial judge,  
3 you know, I'm not a great constitutional scholar or academic.  
4 That's not my approach. I look at things, how am I going to  
01:50PM 5 put this case on trial? What makes sense? And at the same  
6 time, give due process to the defense. Defense has to be able  
7 to challenge causation that all these individuals actually  
8 bought the product based on the representation that it was 100  
9 percent natural. They've got to do it consumer by consumer.

01:50PM 10 And I didn't -- although, again, I think you got to  
11 have your advertising being accurate for the consumers -- and  
12 that's where you expect your federal government and your state  
13 governments to be zealous in protecting the consumers.

14 From a private civil litigation, I wouldn't have  
01:51PM 15 taken on this case if I were you because it had so many  
16 problems. And then if you look at you had to litigate it for  
17 eight years, and then the result is that the defendants  
18 reasonably changed their advertising, and then that was in  
19 connection with, I know, a corporate transaction -- I get that.  
01:51PM 20 But you still achieved them taking that advertising down. And  
21 then you got people who are going to get some money.

22 Whereas, if I was handling this case, and I -- I  
23 think most of you were here. I said, "We're going to have to  
24 tee this up for dispositive motions, and we're going to have to  
01:51PM 25 tee it up for, maybe, decertification, or I'm going to start

1 off with a California class. I'm not going to be litigating in  
2 one trial 13 separate classes."

3 You know, that made sense for purposes of, I guess,  
4 settlement, but it did not make sense for purposes of putting  
01:52PM 5 on a trial. And I just don't have the resources to have 13  
6 separate trials. I mean, you'd shut me down from all the other  
7 important cases that I have. So I'm trying to give you a  
8 little more flavor to my comment about management.

9 Management, from my standpoint, I just -- I don't  
01:52PM 10 see how so many classes were certified. And then even with  
11 respect to the California class, I think the plaintiffs had  
12 significant problems on proving causation and damages. And you  
13 got -- part of the settlement, you got that, and you had to  
14 fight tough for eight years.

01:53PM 15 MR. LEVITT: A couple of things: Number one, I  
16 don't think I could have made a better argument in support of  
17 our settlement than Your Honor just made. Number two, with  
18 respect -- just a couple of things and that's it. With respect  
19 to -- and since we're at the end of the road, there's no reason  
01:53PM 20 to get into a back-and-forth on it. But in terms of having to  
21 go to each class member and ask them, that wasn't what our case  
22 was about. Our case was about a price premium as a result of  
23 the false claim on each label.

24 So as a result of that, every class member overpaid.  
01:53PM 25 Whether or not they relied on it, they overpaid as a result.

1 That would have ultimately been something that we would have  
2 ultimately put to a jury at trial had we gotten there. But  
3 it's a moot point now. I just wanted to clarify that it was  
4 not going to be a person by person "Did you rely on this."

01:54PM 5 THE COURT: Oh, I know that's not -- that wasn't  
6 your intent. But I got to believe the defense were going to  
7 say there's a big causation problem here. If this went to  
8 trial on the California class, there's a big causation that --  
9 what I guess I'm -- the issue of reliance is did any of these  
01:54PM 10 people truly rely on this representation when they purchased  
11 this product? I can tell you, I purchase this product all the  
12 time, and I remember seeing the "100 percent natural oil." I  
13 used it to make waffles with the Bisquick bake, and I used it  
14 for other things. I won't bore you. I used it all the time.

01:54PM 15 But how are you going to prove that that  
16 representation was material and then that people did it? And  
17 it sounds like you have in your mind the pitch you were going  
18 to make to me, but I'm here to tell you, as the trial judge, it  
19 was going to be an uphill climb is what I'm saying. And my  
01:55PM 20 recollection is both plaintiffs and the defense said, "Let's  
21 see if we can settle this case before you start to gut our  
22 case." That's my words, not your words. But I encouraged you  
23 to settle this because, you know, we're going to be doing a lot  
24 of work. And at the end of the day, I'm not sure you're going  
01:55PM 25 to get anything.

1 MR. LEVITT: I understand. And as a result of  
2 everything that we had accomplished in the case and with  
3 Your Honor's assignment of Magistrate McCormick as our  
4 mediator, we worked as hard on our settlement as we did for the  
01:55PM 5 eight years of our case. And we got it resolved in a way that  
6 makes every class member who put in a claim more than whole.  
7 So we think it's a strong settlement. We think it's a positive  
8 settlement.

9 We think that Your Honor's tentative frames out some  
01:56PM 10 of the risks, frames out some of the efforts we went through in  
11 this case. And so as a result of that, we appreciate the  
12 tentative. And we hope that, ultimately, when we walk out of  
13 here or shortly thereafter, the tentative becomes a final and  
14 we all go on our way.

01:56PM 15 THE COURT: Good enough.

16 MR. LEVITT: So thank you.

17 THE COURT: Is there anything else any of the other  
18 plaintiffs' counsel want to say before I hear from defense  
19 counsel?

01:56PM 20 MS. TADLER: No, Your Honor. Thank you.

21 THE COURT: All right.

22 MS. SPIVEY: Your Honor, on behalf of Conagra Foods,  
23 I do have a couple points with the tentative, if I could  
24 address --

01:56PM 25 THE COURT: Please do.

1 MS. SPIVEY: Page 3 and page 8, the Court goes  
2 through to the recovery of the class. On page 3(c), there's an  
3 additional fund of \$10,000 to compensate those in the classes  
4 that submit valid proof of purchase receipts for more than 30.  
01:57PM 5 That was actually not capped. The class recovery is not  
6 capped. It's just Conagra's contribution that is capped at  
7 \$10,000.

8 If you look at the settlement agreement,  
9 Section 2.20 and Section 3.1.1.4, both of which make clear that  
01:57PM 10 Conagra's contribution's capped, but the recovery of the class  
11 is not capped, which is consistent with all the pleadings that  
12 the plaintiffs and Conagra have filed for the settlement in  
13 this case.

14 THE COURT: I appreciate that clarification. And  
01:57PM 15 this is a question: Do you think I need to change the wording  
16 of that? And if so, how would you like it changed?

17 MS. SPIVEY: I would make it consistent with the  
18 settlement agreement language. Section 2.20 and  
19 Section 3.1.1.4 are both consistent with one another.

01:57PM 20 Currently, there's been 247 claimants that have  
21 submitted proof of purchase for more than 30 products which  
22 represent 349,000 units. That would be a fund of \$52,000  
23 roughly.

24 THE COURT: Okay. So what is the language? I don't  
01:58PM 25 have the settlement agreement in front of me.

1 MS. SPIVEY: I have it right here. (Reading:)

2 "...an additional fund of 10,000 to

3 compensate all classes that submit valid proof of

4 purchase receipts for more than 30 at 15 cents for

01:58PM 5 each such purchase above 30. Should 10,000 be

6 insufficient to cover such claims, class counsel

7 shall pay the nonfunded claims from fees awarded in

8 this case."

9 It goes on to say (Reading:)

01:58PM 10 "Should 10,000 capped fund not be exhausted,

11 the remaining funds will revert to payment of the

12 New York and Oregon state classes."

13 THE COURT: Okay. And that language -- I write

14 really slowly -- that language is in the settlement agreement?

01:58PM 15 MS. SPIVEY: Yes, Your Honor.

16 THE COURT: Okay. And in a lot of these cases --

17 and I'm sorry, I just focused on the briefs that were

18 submitted -- they ask me to sign off on a judgment, and maybe

19 sometimes there's another order that's issued.

01:59PM 20 Have you proposed any such judgment or order in this

21 case that you want me to issue?

22 MS. SPIVEY: We have not, Your Honor. And I think

23 primarily because J&D has not -- all these numbers that you

24 have on the claims that have been made are pre-deduplication.

01:59PM 25 So the J&D has not taken out the duplications, and they have

1 not run their fraud checks. That would not be done until after  
2 final approval is granted.

3 So the numbers could come down. We don't know when  
4 the final numbers will be --

01:59PM 5 MS. KELLER: Your Honor, if I may?

6 THE COURT: Yes.

7 MS. KELLER: Class counsel will be happy to submit  
8 the order once everything's deduplicated and, also, once  
9 everything is verified as well.

01:59PM 10 THE COURT: Okay. So what -- and then you can put  
11 in there what you feel is appropriate and we'll give,  
12 obviously, anybody a chance to object to whatever you submit  
13 before I sign off on it. But I will make the change to this  
14 order to have -- make sure that this language is consistent  
02:00PM 15 with the settlement agreement language here on page 3. And you  
16 said it's on page 8 too.

17 MS. SPIVEY: Yes, sir. The paragraph starting with  
18 "In addition to this award."

19 THE COURT: Yeah. Yeah. So I'll modify that.

02:00PM 20 And then if you would be kind enough to meet and  
21 confer and submit any other documents you want me to issue that  
22 are consistent with this order -- such as the judgment or if  
23 there's any other order that you want -- that would be great.  
24 And then I'll give a few days for anybody to object. And then  
02:00PM 25 I will issue those as well.

1 Is that acceptable?

2 MS. SPIVEY: Yes, Your Honor.

3 MR. LEVITT: Yes, Your Honor.

4 MS. SPIVEY: I do have one more point on page 3 as  
02:01PM 5 well. The tentative order says "After the parties reached the  
6 settlement agreement, Conagra sold the Wesson brand to  
7 Richardsons [as spoken] International." That actually occurred  
8 three months before the settlement agreement.

9 THE COURT: Okay.

02:01PM 10 MS. SPIVEY: The sale to Richardsons was formalized  
11 in December of 2018; settlement agreement is March of 2019.

12 THE COURT: I see. So you reached an agreement  
13 before, but it wasn't finalized until after?

14 MS. SPIVEY: Correct, Your Honor.

02:01PM 15 THE COURT: Okay. So was it a tentative settlement?

16 MS. SPIVEY: There was nothing in writing. Yes, I  
17 believe that plaintiffs would agree with me that it was a  
18 tentative settlement that we discussed and were negotiating out  
19 with Judge McCormick. The settlement agreement had not been  
02:01PM 20 signed. It wasn't signed. It was dated March of 2019. The  
21 settlement to Richardson was closed in a done deal as of  
22 mid-December 2018.

23 THE COURT: All right. So I'm trying to think how  
24 can I make this simpler. What modification do you want on  
02:02PM 25 page 3 on that?



1 MS. TADLER: Your Honor, this is Ariana Tadler for  
2 plaintiffs. I'm sure my colleague may have some specific words  
3 that she would like included. We actually disagree. We  
4 believed we had an agreement in principle at that point.

02:02PM 5 THE COURT: Okay.

6 MS. SPIVEY: Your Honor, I would say the tentative  
7 order doesn't say "agreement in principle." It references "The  
8 Settlement Agreement" with caps. That references the document  
9 that was signed in March of 2019.

02:02PM 10 THE COURT: Well, how about "Parties reached a  
11 settlement in principle"?

12 MS. SPIVEY: That would be fine with me, Your Honor.

13 MS. TADLER: No objection, Your Honor. Thank you.

14 THE COURT: "After the parties reached a settlement  
02:02PM 15 in principle, Conagra sold the Wesson brand." Okay.

16 MS. SPIVEY: Thank you, Your Honor.

17 THE COURT: Anything else?

18 MS. SPIVEY: Nothing further on behalf of Conagra.

19 THE COURT: And do you have any comments to my  
02:03PM 20 comments? Because it is your record with respect to -- I  
21 thought there were a lot of legal and procedural hurdles that  
22 the plaintiffs would have to overcome. Was I speaking out of  
23 turn, or was I accurately depicting how you were going to  
24 contest causation and damages pretty vigorously?

02:03PM 25 MS. SPIVEY: We definitely agree with Your Honor's

1 assessment of that. We had planned on filing a motion to  
2 decertify the classes, the motion for summary judgment, and  
3 then a motion to sever the different state classes and then to  
4 transfer them back to their original state, which would have  
02:03PM 5 required 11 different trials and 11 different jurisdictions if  
6 we did not prevail on the motion for summary judgment, which we  
7 feel like we had a good chance of prevailing at.

8 So we certainly agree with Your Honor's assessment  
9 and with the issues with plaintiffs' case.

02:04PM 10 THE COURT: I think there are several recent  
11 decisions from the Circuit. I know Judge Kleinfeld was the  
12 *Mazza* decision, how a lot of these state subclasses, they  
13 really should be tried in the states.

14 MS. SPIVEY: Correct, Your Honor. We also had the  
02:04PM 15 label change in July of 2017. After that label change, there's  
16 no evidence that there was a drop in the price that people paid  
17 for Conagra's product, the Wesson Oil product, and there was no  
18 decrease in sales. So it really belied all allegations of a  
19 price premium.

02:04PM 20 THE COURT: And that's helping me recall. I had a  
21 lot of issues that -- and I don't know whether Judge Morrow  
22 shared those issues with you or not, but I had a lot of issues.  
23 And like it or not, I was going to be the judge who was now  
24 charged with resolving all of this.

02:04PM 25 MS. SPIVEY: We certainly liked that.

1 THE COURT: Okay. Well, I appreciate it. It sounds  
2 like we're singing to the choir.

3 Mr. Frank, I think it's probably pretty clear to  
4 you, sir. I'm trying to be as respectful as I can, but you  
02:05PM 5 have a pretty steep, uphill battle to convince me otherwise.

6 MR. FRANK: Thank you, Your Honor. It's -- what I'm  
7 hearing from you is because the plaintiffs had a weak case, the  
8 fact that the class is getting anything is what makes this  
9 settlement fair. And I would just simply disagree that that's  
02:05PM 10 neither necessary nor sufficient.

11 If the parties came to you with an \$8 million common  
12 funds and the attorney said, "We want 87 percent of that," you,  
13 I would hope, reject that. And if you didn't, it would be  
14 reversible error under *Dennis v. Kellogg*. The parties have an  
02:05PM 15 obligation, even if the defendant is settling for more than the  
16 case is worth, to share that windfall proportionately with the  
17 class. And that's stated in *Bluetooth*, 654 F.3d 935. The fact  
18 that the plaintiffs worked very hard for the case is irrelevant  
19 to the fairness of the settlement, and that's *HP Inkjet*, 716  
02:06PM 20 F.3d 1173.

21 It was possible to get the class more money. It's  
22 not the case that the class got everything they could have  
23 gotten because 99 percent of the class is getting nothing. It  
24 was possible to subpoena, say, Ralphs supermarket and get a  
02:06PM 25 list of all the consumers who bought Conagra from 2010 to 2017

1 and distribute checks to them proportionately or otherwise. It  
2 was possible to take that \$8 million that Conagra is willing to  
3 pay and split it, 2 million to the attorneys and 6 million to  
4 the actual class. But they didn't do that. Instead, they have  
02:07PM 5 a claims process where there's no direct notice to the class.

6 There's no effort to identify individual class  
7 members. And remarkably they structured the settlement so that  
8 there's an incentive for them not to tell the class. Because  
9 anything that exceeds that \$10,000 fund comes out of the  
02:07PM 10 plaintiff -- out of counsel's pockets.

11 They set up the settlement to create a conflict of  
12 interest between themselves and their own clients. Because  
13 every additional dollar that's going to the class members that  
14 exceed the \$10,000 fund goes out of their own pockets.

02:07PM 15 Now, the way they get around this is they set up  
16 separate funds. They have one claims-made fund for the class  
17 and then a separate attorney fee fund for themselves with clear  
18 sailing. Defendants agree not to challenge the fee request.  
19 And then any reduction in the fee goes back to the defendants,  
02:08PM 20 and that's called a kicker. And that is what makes the

21 settlement unfair under *Bluetooth*, 654 F.3d 935. That's all  
22 three elements. Red flags, the Ninth Circuit called them.

23 You had the disproportionality, which Your Honor  
24 pointed out. You have the clear sailing, which whereby the  
02:08PM 25 plaintiffs negotiated for themselves an elimination of any

1 challenge to their fee request. And then any fee request,  
2 instead of going to the class, any reduction goes to the  
3 defendant. And because of that, 7 million is going to the  
4 attorneys, give or take, and less than a million to the class.  
02:08PM 5 That's the disproportionality forbidden by *Bluetooth*, forbidden  
6 by *Pearson vs. NBTY*, 772 F.3d 778.

7 Now, they justify it with the injunction, and it's  
8 remarkable. The Court says, "Well, the injunction's hard to  
9 value," and I would disagree with that. I would say the  
02:09PM 10 injunction is very easy to value. It's worth zero because it  
11 doesn't require Conagra to do anything. Conagra couldn't  
12 violate the injunction even if they wanted to because they  
13 don't own Wesson Oil anymore, and it doesn't bind Richardson.  
14 So it's the very definition of an illusory injunction, the sort  
02:09PM 15 of thing courts routinely reject as a justification for a  
16 settlement. And that's Subway's footlong, that's Walgreens  
17 shareholders -- many settlements where the parties try to  
18 create the illusion of relief to justify a large attorney fee  
19 so that they can get a case settled without the defendant  
02:10PM 20 actually having to do anything. And it's unfair to the class  
21 to ascribe any value to that injunction and permit the  
22 disproportion of relief that occurs here.

23 Now, I'm not saying that it's unfair for Conagra to  
24 only surrender \$8 million. As the Court pointed out. There  
02:10PM 25 are a lot of problems with the settlement. There are a lot.

1 There's no evidence that there is a price premium. Because  
2 after Conagra changed the label, the price didn't drop. But  
3 that's what they're basing the value of the injunction on, the  
4 very same price premium that defendants dispute. And they're  
02:10PM 5 trying to have it both ways. On the one hand, we stipulate  
6 that the injunction has value, but on the other hand, we  
7 dispute that there is any price premium or any effect from the  
8 label change.

9 So we're not saying that the defendants had to  
02:10PM 10 settle for 80 million or 15 million or even 8 million and  
11 1 dollar instead of the 8 million they settled for. But with  
12 that \$8 million pie, there is some obligation under Rule 23(e)  
13 as a matter of law to distribute it proportionally between the  
14 attorneys and the class. And they have structured the  
02:11PM 15 settlement with impermissible clauses to ensure that it would  
16 be improperly divided between the attorneys and the class and  
17 create the disproportion that Your Honor expressed the concern  
18 about.

19 Now, a claims-made process, I think it's very  
02:11PM 20 important to recognize, and the FTC while this case -- while  
21 the objection was pending released a study that shows that it's  
22 very easy to manipulate how many people make a claim. If you  
23 give them direct mail in an envelope, you get claims rates  
24 close to 10 percent. If you send them an e-mail, it's  
02:11PM 25 3 percent. And if as happened here, there's no notice of the

1 class, you get what actually happened here, which is a claims  
2 rate of less than 1 percent.

3 And because of that, the parties, by structuring the  
4 claims process, however long it is or however much proof you  
02:12PM 5 have to put in or what notice goes to the class, you can  
6 determine with actuarial certainty how many claims there will  
7 be in advance. And you know when you have a claims-made  
8 settlement like this that less than 1 percent of the class is  
9 going to make a claim, and that's what they agreed to. And not

02:12PM 10 only did they know that, they were so confident of it, they  
11 agreed to act as the insurers for Conagra. If too many people  
12 made claims, it would come out of their own pockets.

13 So for those reasons, that's the argument we would  
14 end up making to the Ninth Circuit if the tentative ruling

02:12PM 15 became a final ruling. The settlement's unfair under  
16 Rule 23(e), it's unfair under *Bluetooth*. And the conflict of  
17 interest presented here by the settlement clause whereby if the  
18 class counsel notifies too many class members, they have to pay  
19 the additional claims out of their own pocket shows, I think,  
02:13PM 20 firsthand the problems with the settlement and the confidence  
21 that class counsel had that there wouldn't be that many claims  
22 and that they were negotiating the settlement that would  
23 benefit themselves at the expense of the class.

24 I'm happy to answer any questions you have, Your  
02:13PM 25 Honor.

1 THE COURT: No. You've been thorough. I'll give  
2 you another chance to respond after I hear from defense  
3 counsel, and then I'll give the plaintiffs' counsel --

4 MS. SPIVEY: Your Honor, the objection, it goes back  
02:13PM 5 to what we said in our brief and our submission, it is more  
6 than fair to the class members. And there's no evidence and  
7 not even any argument that what the class members are receiving  
8 is in any way unfair or unreasonable. It's more than generous,  
9 as the Court has pointed out. And that's the burden that the  
02:14PM 10 objector has to set aside the settlement, and they can't do it.  
11 They're not even arguing it. They're not even saying that what  
12 the class members received is unfair or unreasonable. He never  
13 said that in his briefing or today in front of this Court.

14 And that is the burden he carries as the objector,  
02:14PM 15 to set aside a very fair and reasonable settlement. In fact,  
16 this is a generous settlement to the class, as we've already  
17 established here. So he hasn't met the burden to set aside the  
18 settlement.

19 THE COURT: These are my words of what Mr. Frank  
02:14PM 20 said, so he might disagree with this characterization. But  
21 listening to him, I felt he was saying, you know, you have to  
22 analyze what's the proportionality between what the attorneys'  
23 fees are and then what the class gets. And here the attorneys'  
24 fees is, you know, approximately -- what is it? --

02:15PM 25 MS. SPIVEY: 6.85.



1 THE COURT: -- 6.85, \$7 million, approximately,  
2 whereas that's not what the class members are getting. And  
3 that the injunction is illusory, there's a lot of questions  
4 with that. But, you know, starting off is -- I didn't feel the  
02:15PM 5 injunction was illusory.

6 I just have a recollection that this whole case was  
7 impacting your client's business and your client's hope to sell  
8 this division in the Conagra/Wesson brand and -- am I wrong  
9 about that? That this injunctive relief was a big issue to  
02:15PM 10 your client?

11 MS. SPIVEY: I'm unaware if this case or the  
12 injunctive relief had any issue to do with the sale of the  
13 brand. Conagra had sold the brand to Smucker's before our  
14 first mediation in this case ever happened. And then the sale  
02:16PM 15 did not go through because the government killed it. And so  
16 the brand remained on the auctioning block.

17 And as a matter of fact, in all of our federal SEC  
18 filings K1s, K2s, I'm not an SEC attorney, so I may get the  
19 number wrong, we had -- the Wesson Oil brand held as an asset  
02:16PM 20 for sale. So this was always on the auctioning block since the  
21 Smucker's sale fell through because of the government.

22 I'm not the deal lawyer for Conagra, but I was  
23 unaware of anything relating to this case or the injunction  
24 that would have held up any sale.

02:16PM 25 THE COURT: But did this litigation -- wasn't that a

1 carve-out from the deal? In other words, wasn't your client  
2 going to have to be responsible for whatever damages, if any,  
3 the plaintiffs were able to recover?

4 MS. SPIVEY: Correct. Because the classes all end  
02:16PM 5 in July of 2017 when Conagra took the "natural" claim off the  
6 label. Conagra would have generated all the revenue from the  
7 sales at issue. The class period would have ended years before  
8 the sale was commenced.

9 So, yes, Conagra would have retained the liability  
02:17PM 10 for the damage and did in this case and would be paying here.

11 THE COURT: Do you agree with Mr. Frank's  
12 characterization, that the injunction was really illusory?

13 MS. SPIVEY: So we disagree with most everything  
14 that plaintiffs' expert Mr. Weir has said. We do believe that  
02:17PM 15 a lot of his damage models are a house of cards, ready to fall.  
16 We have briefed that and are currently briefing it in a couple  
17 of cases that we have where Mr. Weir is the plaintiffs' expert.

18 We did not agree to any evaluation retroactively of  
19 the injunctive relief because we don't believe injunctive  
02:17PM 20 relief had any retroactive fact. We only agreed to  
21 forward-facing conjunctive relief and the evaluation of that.

22 THE COURT: Okay.

23 MS. SPIVEY: If I could, one more thing real quick.  
24 The plaintiffs' lawyer -- sorry. The objector had said a few  
02:17PM 25 times -- it seems to me he was more concerned that we didn't do

1 direct consumer sales or notification of the class, that we  
2 somehow manipulated the claims recovery rate because we didn't  
3 send you, Your Honor, a letter saying "You should send this in"  
4 or we should just send you a check. We had no way of doing  
02:18PM 5 that. Conagra has no direct consumer sales.

6 So you and no one else in America can go to  
7 Conagra's website and buy its products. That's not the way  
8 Conagra's business is done. So we didn't have consumer. We  
9 didn't know you purchased the product. And we would have had  
02:18PM 10 no way of knowing that. Because you might go to a grocery  
11 store or order it online from Amazon. We don't know who those  
12 people are. So we had no way of giving the plaintiffs a list  
13 of all the consumers or potential class members so that they  
14 could have sent consumers direct notification of the  
02:18PM 15 settlement.

16 This was not a purpose manipulation on their part or  
17 ours to manipulate the claims rate. This is just the way our  
18 business is run. We don't have that information to provide.

19 THE COURT: So not only did you not have the  
02:18PM 20 information on who were the purchasers of the product, but then  
21 you certainly didn't know why they bought it and whether it had  
22 anything to do with the representation that it's 100 percent  
23 natural.

24 MS. SPIVEY: Exactly.

02:19PM 25 And, Your Honor, we actually pointed out to a survey

1 that we did -- that we commissioned as part of the litigation.  
2 That's fully briefed in all of the class certification  
3 documents that show that the "natural" claim was a motivating  
4 factor for less than 3 percent of those surveyed. So  
02:19PM 5 97 percent of the people who bought Wesson Oil bought it  
6 because their grandmother bought it or because it was a legacy  
7 product they bought for decades or for other reasons other than  
8 the "natural" claim on the product.

9 THE COURT: Mr. Frank argued very eloquently with  
02:19PM 10 citation to law that, you know, there has to be some  
11 proportionality between what the class members get and what the  
12 plaintiffs' attorneys get. And I know plaintiffs' attorneys  
13 are anxious to respond to that.

14 But I would be interested in your response to that  
02:20PM 15 because this settlement agreement was agreed to by you. So  
16 tell me if Mr. Frank is correct about that. And if not, tell  
17 me why not.

18 MS. SPIVEY: Your Honor, I'll leave it to the  
19 plaintiffs' lawyer to tell you what the case law says in this  
02:20PM 20 area because, quite frankly, I didn't look into the case law  
21 all that much in this area. Is there a discrepancy between  
22 what the class is getting and what the plaintiffs' lawyers are  
23 getting? Yes. Is it justified? That's for the Court to  
24 decide.

02:20PM 25 I don't really know the case law, so I can't stand

1 up here, like Mr. Frank, and cite off the top of my head all  
2 the cites that would support that.

3 THE COURT: Okay. You've answered my questions.

4 MS. SPIVEY: I would say one more thing that we  
02:20PM 5 would point out. Conagra, in negotiating this settlement, was  
6 very concerned about -- we called them buckets -- what each  
7 bucket of settlement was and how much money went to each  
8 bucket. Conagra never said, "Here's \$8 million. You guys  
9 figure out how you want to divvy it up."

02:20PM 10 That's just not the way this happened, and that  
11 would not be anything Conagra would ever entertain here. We  
12 don't want to incentivize plaintiffs to file what we believe to  
13 be frivolous lawsuits against us. And if we gave them ten  
14 times the purchase price of any product, we're setting a  
02:21PM 15 precedent that would be very detrimental in incentivizing  
16 frivolous labeling claims.

17 So this was not a situation where we said, "Here's  
18 \$8 million. Go figure out what you want to do with it." This  
19 was negotiated painstakingly for each bucket, I would say, as  
02:21PM 20 we called it, during the settlement negotiation process.

21 THE COURT: And I have my own understanding of why,  
22 and I know this was a recommendation by Judge McCormick, who I  
23 have great respect for. But tell me why you did this. Why did  
24 you agree to this settlement where you would have these  
02:21PM 25 individual buckets, and then you have approximately \$7 million

1 going to the attorneys?

2 MS. SPIVEY: Your Honor, I'm not at liberty to  
3 disclose Conagra's motivation for wanting to enter into a  
4 settlement here. That's protected by the attorney-client  
02:22PM 5 privilege.

6 I think the obvious reasoning is we didn't own the  
7 brand anymore. We don't own the brand. We have no intention  
8 of buying the brand back. So we're fighting over something  
9 that just doesn't impact us anymore. And at some point, that  
02:22PM 10 just didn't make much sense.

11 THE COURT: And I assume -- and I respect that. I  
12 apologize if, in any way, I was trying to invade the  
13 attorney-client privilege. That was the last thing I was  
14 trying to do. I was just trying to understand it for the  
02:22PM 15 record to defend approving this.

16 The litigation cost must have been enormous on your  
17 client's behalf, especially if you were talking about then  
18 decertifying these classes and sending them back to state  
19 court.

02:22PM 20 MS. SPIVEY: We were facing a lot of litigation  
21 costs. Why -- I think we would have and could have prevailed  
22 on a motion to sever and then a motion to transfer. That would  
23 have been a huge victory for us. It also came at a cost for us  
24 because that also throws us trying 11 different state classes  
02:23PM 25 in 11 different states. It causes us to argue motions for

1 summary judgment in 11 different states under 11 different  
2 state laws. So while I think we could have and would have  
3 prevailed on the merits, it was with a cost. I'm not free. So  
4 Conagra was definitely paying legal fees.

02:23PM 5 THE COURT: It is a question, it is not an order,  
6 and you'll probably shut me down, but can you give me any  
7 general estimate on how much your client spent on this  
8 litigation?

9 MS. SPIVEY: Substantially less than the plaintiffs  
02:23PM 10 have claimed that they spent. That could be a reflection of me  
11 sitting by myself and the plaintiffs' lawyers having five  
12 attorneys sitting at the table. And that's generally the MO  
13 that we've been handling this case under. So our fees and  
14 costs are substantially less.

02:23PM 15 THE COURT: But was it over a million dollars that  
16 you litigated this over eight years?

17 MS. SPIVEY: So I really -- we are on different  
18 types of alternative fee arrangements with Conagra, so I  
19 couldn't quantify that for you.

02:24PM 20 THE COURT: Okay. Thank you.

21 MR. LEVITT: In terms of what the other side spends,  
22 that's always a red herring, for a couple of reasons.  
23 Number one, there were three different firms involved for  
24 Conagra over eight years. So we -- so to the first firm, the  
02:24PM 25 Hogan Lovells firm, whether they got fired, removed,

1 substituted, I don't know, they spent a lot of time. So I  
2 don't know whether that's included.

3 Second of all, you never know. And we have this  
4 conversation in every case, every mediation, a company like  
02:24PM 5 Conagra can cut a flat rate deal with their counsel, can cut a  
6 discounted rate. Every defense firm wants Conagra's business.  
7 So to compare apples to oranges here, it doesn't really move  
8 the needle, I don't think, in any real way.

9 THE COURT: I'm gathering that. So then why did I  
02:25PM 10 ask it? Well, I just know in many litigations, but not in this  
11 type of litigation, when a plaintiff obtains a recovery -- for  
12 example, on a civil rights case, the federal law allows for  
13 awards of attorneys' fees. And then I hear defense counsel  
14 saying, "How in the world can you give them 1.5 million,  
02:25PM 15 \$2 million in attorneys' fees? This is crazy."

16 But then one of the first questions you ask, "Well,  
17 how much have you spent litigating this very important civil  
18 rights case?" And it's usually more than what the attorneys'  
19 fees award is. And I realize that that analogy doesn't work in  
02:25PM 20 this case for a lot of different reasons, but I just -- from  
21 the record that I have, the number of Complaints, the going to  
22 the Circuit on certification -- my God, you must have spent  
23 hours just reading Judge Morrow's -- I really --

24 MR. LEVITT: There wasn't a staple large enough in  
02:26PM 25 the courthouse. It was a paper fastener that I've never seen



1 before.

2 THE COURT: I've never seen a district court  
3 decision that long. And I'm not trying to criticize her, I'm  
4 just saying this was a very hard-fought litigation is the point  
02:26PM 5 I was trying to make, and that's very expensive to the parties.  
6 So I'm just trying to get -- trying to flesh out defense  
7 counsel to quantify that expense and burden. Because I know it  
8 was one.

9 MR. LEVITT: Right. And all I'm saying is while it  
02:26PM 10 was clearly really expensive for them, it's hard to make an  
11 apples-to-apples comparison compared to what we do versus what  
12 they do for all sorts of reasons, the fee negotiations with  
13 their clients, et cetera.

14 THE COURT: I agree.

02:27PM 15 MR. LEVITT: A few things, I'm going to start with a  
16 case that Mr. Frank cited, the *Dennis* case, because it's  
17 important. In that case the Court said when assessing the  
18 merits of an objection to a class-action settlement, courts  
19 consider the background and intent of objectors and their  
02:27PM 20 counsel, particularly when indicative of a motive other than  
21 putting the interest of class members first.

22 And I'm going to couple that with the tweet that  
23 Mr. Frank put up on July 24th, 2019, which I will say he put up  
24 before he blocked my partner, Amy Keller, from accessing his  
02:27PM 25 tweets where he states:

1 "This kind of settlement is illegal" -- he  
2 says incorrectly in the Seventh Circuit thanks to  
3 his organization -- "Will the ND Cal or  
4 Ninth Circuit stand for it? Hard to know unless a  
02:28PM 5 class member is willing to object against this sort  
6 of abuse. But if court did approve, it would be an  
7 interesting circuit split."

8 So for Mr. Frank and what he does in his  
9 organization -- when you're a hammer, everything looks like a  
02:28PM 10 nail. And every argument he makes comes down to the same  
11 thing: plaintiff lawyers should make less money. The  
12 settlement's unfair. We should make less money. It should  
13 have been a different notice program. We should have made less  
14 money. It all boils down to making what we do for whatever  
02:28PM 15 reason as cost-effective as possible for us. And that's a  
16 fact.

17 So where we are here -- first of all, the  
18 ideological piece needs to be considered, where the objector is  
19 coming from on this. Because it's not from a place in class  
02:29PM 20 members' interest here certainly. Because as we pointed out --  
21 and he doesn't make any other actual alternative proposal -- we  
22 got more for each claiming class member than they could have  
23 gotten at trial. Especially as Your Honor pointed out in  
24 Your Honor's courtroom, we wouldn't have even gotten to trial,  
02:29PM 25 as Your Honor is saying.

1           So that being said, there isn't a better  
2 alternative. We did better than 100 percent. That's number  
3 one. Number two, Mr. Frank doesn't have standing to challenge  
4 the fees here because the fees are not coming out of a fund.  
02:29PM 5 And that's from the Ninth Circuit. It's 645 F.3d, 1084, 1088  
6 in *Glasser* against *Volkswagen* where it says, in pertinent part:

7           "If modifying the fee award would not  
8 'actually benefit the objecting class member,' the  
9 class member lacks standing because his challenge  
02:30PM 10 to the fee award cannot result in redressing any  
11 injury."

12           So Mr. Frank doesn't have standing to make the  
13 arguments he's actually making here.

14           And, furthermore, this whole question on  
02:30PM 15 proportionality, which Mr. Frank tweets as a bright, shiny  
16 object, it only matters if it affects the relief to the class,  
17 and it does not. There was -- if you gave us zero in fees, the  
18 class would not get anything more.

19           As Conagra's counsel was really clear, they aren't  
02:30PM 20 interested in windfalls. That was a hotly negotiated point.  
21 And so we got them an amount over 100 percent that Conagra  
22 would fully approve. We also put ourselves on the line for  
23 anything over 10,000 in the 30-plus claim category that it was  
24 going to come out of our pocket.

02:31PM 25           The other thing, also, if every class member claimed

1 this was an uncapped -- this was an unkept claims-made  
2 situation, Conagra could have been on the hook for tens of  
3 millions of dollars more. So for Mr. Frank to even argue that  
4 it's this 87 percent number, it was based upon a retrospective  
02:31PM 5 evaluation rather than actually looking at what was available  
6 to the class members, which is over 100 percent than what they  
7 could have gotten at trial.

8 Then he goes into the issue of class notice. We  
9 could have done something else, he said. But interestingly,  
02:32PM 10 Your Honor, in his papers, and he filed a lot of them, he did  
11 not object to class notice. So for him to come in now and  
12 argue about class notice is absolutely improper.

13 Second of all, our class notice program, which was  
14 actually fully vetted and approved by Magistrate  
02:32PM 15 Judge McCormick. He vetted competing proposals, and he picked  
16 the one that he felt was the most robust and most meaningful  
17 with a leading settlement administrator who did a  
18 state-of-the-art program.

19 So even if Mr. Frank had the ability to argue the  
02:32PM 20 notice issues this afternoon, which he does not, the notice  
21 program -- which this Court approved and was actually chosen,  
22 after a vetting process by a federal magistrate judge -- was a  
23 fully acceptable program. The fact that there was a small  
24 claims rate, it happens. It happens in lots of these kinds of  
02:33PM 25 cases. It doesn't mean that it was an ineffective notice

1 program.

2 And with respect to Mr. Frank's proposed notice in  
3 terms of a subpoena to all grocery stores, it would eclipse the  
4 amount of settlement relief altogether. Instead, we worked  
02:33PM 5 with our notice provider, the J&D company, to target the class  
6 members in ways that had been found to be acceptable in every  
7 court.

8 So moving on from there, and I stated this  
9 earlier -- but let me go back to it, and it's in our papers as  
02:34PM 10 well -- anytime there's a decoupling of the attorneys' fees in  
11 class relief, which happened here, the Lodestar method, as Your  
12 Honor points out, is entirely appropriate.

13 And as I said, also, paying us less won't give this  
14 class anything more. So we're talking about two entirely  
02:34PM 15 different things. You could pay us nothing. You could pay us  
16 \$100 million. The class isn't getting a penny more. It's just  
17 the way it is. So to say that the settlement has a defect of  
18 some sort because an objector whose sole goal is to make us  
19 earn less is saying we should earn less, it is of no moment to  
02:34PM 20 a single class member. It is entirely an agenda, an  
21 ideologically driven crusade that won't have a positive effect  
22 here. All it does -- I know what he wants, Your Honor, to  
23 actually do is throw out the settlement.

24 So this whole settlement that was after eight years  
02:35PM 25 of hard work on all sides of getting it done, changing the

1 laws, getting over 100 percent, he wants you to throw it out.  
2 And he wants you to throw it out by putting -- put the class  
3 members' interest at risk.

4 And why that's interesting is that in the Southwest  
02:35PM 5 Airlines case where I was actually named plaintiff, so I'll  
6 front that issue, Your Honor.

7 At the Seventh Circuit, Mr. Frank argued that  
8 because my lawyer failed to disclose to the Court that he and I  
9 work on other cases together, I should have been -- he should  
02:35PM 10 have been disqualified. And he was saying that because, he  
11 argues, because we were putting the class members' interest at  
12 risk -- or we had the class members' interest in our hands.  
13 There's a duty of candor that he said by failing to disclose,  
14 that required a disqualification.

02:36PM 15 Now the shoe's on the other foot. Mr. Frank, the  
16 only objector he could find from his ongoing Twitter storm was  
17 an expert he works with and pays for. So someone who he has  
18 worked with, and he has an ongoing financial relationship with,  
19 is his only objector in this case, and the only objector in  
02:36PM 20 this case.

21 So I would simply -- I suggest in the midst of all  
22 of this and after Your Honor has approved the settlement on its  
23 merits for all of the positive things we got in light of all of  
24 the serious risks as Your Honor has pointed out, based on  
02:36PM 25 Mr. Frank's own arguments on the record in the Seventh Circuit,

1 there are grounds for Your Honor to disqualify Mr. Frank and  
2 Professor Henderson as an objector -- an objector's counsel in  
3 this case, which they failed to advise Your Honor that what was  
4 really going on here, they're willing to put the interest of  
02:37PM 5 the class members at risk without -- without advising  
6 Your Honor of their -- their own financial and business  
7 dealings.

8 "So don't trust me, trust him." That's the argument  
9 he made. So we made this qualification argument in our papers.

02:37PM 10 So we would actually reraise it right now, Your Honor, that to  
11 the extent that Your Honor would consider Mr. Frank's and  
12 Professor Henderson's conduct consonant with what happened in  
13 Southwest Airlines, and just going with Mr. Frank's argument in  
14 Southwest Airlines, he and Professor Henderson should be  
02:37PM 15 disqualified.

16 So with respect to the next point on the injunction,  
17 the label change alone, as Mr. Weir pointed out, and also while  
18 I appreciate Conagra's counsel's gratuitous attack on Mr. Weir,  
19 Mr. Weir -- Mr. Weir's expert opinion had been sustained around  
02:38PM 20 the country including by Judge Morrow in this case. So the  
21 fact that counsel is saying that he believes -- she believes  
22 his opinions are based on a house of cards, lots of judges  
23 including judges who used to be in this court and the  
24 Ninth Circuit have actually certified classes, have approved  
02:38PM 25 settlements on Mr. Weir's own work and findings.

1           So that being said, Mr. Weir found the value of the  
2 label change. And I know that Conagra's counsel says that the  
3 change had nothing to do with our case. But if we ultimately  
4 went to trial on this, we would put our catalyst argument in  
02:39PM 5 front of a jury here and explain that. The facts alone, we  
6 filed a case, we litigated the case, classes were certified,  
7 they changed the label.

8           So Conagra can say they changed it for other  
9 reasons, and a jury would ultimately figure that out. But to  
02:39PM 10 say that it didn't have any value, we disagree. So we do  
11 believe that a claim that the injunction is an illusory  
12 injunction is simply wrong.

13           Moreover, as our other expert put forth in his  
14 report, the fact is that under normal corporate practice, once  
02:39PM 15 a company changes its label, even a successor company, the odds  
16 of them changing it back are infinitesimally small. So there  
17 was a benefit of that as well. And I think Your Honor  
18 recognized there was a value. Maybe not the value we put it  
19 all the way, but that Your Honor said there was a value to the  
02:40PM 20 injunctive relief.

21           So I guess, Your Honor, in sum, there is nothing  
22 wrong with our settlement, as Your Honor points out in your  
23 tentative. In fact, it's a great settlement that resulted from  
24 more than eight years of hard lawyering. Great results: A  
02:40PM 25 change in the Ninth Circuit's law on ascertainability; 136



1 percent result for claim and class members; and real change, in  
2 the course of this litigation, in Conagra's conduct.

3 There was nothing to object to here. Mr. Frank and  
4 Professor Henderson are being obstacles to justice rather than  
02:41PM 5 facilitators of justice. They're grasping at illusory straws  
6 to advance an agenda that has nothing to do with this case or  
7 our settlement here. And they've withheld vital information  
8 about their own relationship from this court and were less than  
9 candid with the Court in doing so.

02:41PM 10 So as a result of all that, we respectfully say that  
11 Your Honor should enter the tentative and, as I stated,  
12 disqualify Mr. Frank and Professor Henderson as well thereby  
13 both overruling the objection and mooted it in light of the  
14 fact that there won't be an objector anymore, because he  
02:41PM 15 doesn't belong here. Thank you.

16 THE COURT: Thank you.

17 MR. AZAR: Your Honor, may I supplement one point,  
18 which Adam had covered it but went over it quickly on the  
19 \$10,000 limit.

02:42PM 20 So the 10,000 limit was only for people who  
21 submitted receipts for 30 units or over. That, in part, was  
22 meant to address your question about causation. So class  
23 members were allowed to submit a plain declaration without  
24 support if they purchased up to 30 units. And when you think  
02:42PM 25 about this as a consumer, you may think about how many bottles

1 of oil do you purchase per year. So in that respect, there was  
2 no incentive, no conflict for anybody who wanted to submit  
3 claims for up to 30 units to just submit because there was no  
4 comp for the class members. It doesn't affect any dollar  
02:42PM 5 amounts.

6 In contrast, only at 30 units and above -- if people  
7 kept their receipts and they wanted to prove causation that  
8 they were actually impacted by buying more than 30 units, only  
9 they have to submit for the overage over 30 units.

02:42PM 10 If you want to say, "I bought 31 units, and I want  
11 that one extra one that they don't have to provide proof for,"  
12 then you have to provide the receipts. And that's the  
13 difference. And that's why that separate \$10,000 was put off  
14 to the side by Conagra just for those people who kept receipts  
02:43PM 15 for all of these years who purchased over 30 units who wanted  
16 to prove that from a causation perspective.

17 THE COURT: All right.

18 MS. SPIVEY: Your Honor, if I could jump in for one  
19 second to address it, we disagree that proof of purchase  
02:43PM 20 equates to causation. Causation has to do with what your  
21 purchasing motivation was for buying the product, and the proof  
22 of purchase does not reflect that.

23 So we would disagree with the class counsel's point  
24 that somehow receipt or proof of purchase equates to causation.

02:43PM 25 THE COURT: All right.

1 MR. FRANK: In my previous discussion, I cited  
2 *Dennis v. Kellogg*, which is at 697 F.3d 858, and I cited it for  
3 the proposition that an 87 percent share of the common funds  
4 was, per se, unreasonable because in that case it was a  
02:44PM 5 38 percent, and that's what the Court said was unreasonable.

6 The language that Mr. Levitt purports to cite from  
7 the opinion I cited appears nowhere in that opinion. And you  
8 can look that up and you can judge the rest of the credibility  
9 of his arguments which, as we noted in our other filings, are  
02:44PM 10 remarkably frivolous. He misrepresents Southwest. He  
11 misrepresents our arguments. He misrepresents what I stated.  
12 And we document all this in the declarations, Mr. Henderson's  
13 declarations, and Docket Number 685.

14 I won't repeat it here unless the Court has  
02:44PM 15 questions about it, but it's all in writing. He doesn't say  
16 anything new. It's everything that previously violated Rule 11  
17 and he has the gall to personally attack me and my client here  
18 when we have done nothing wrong.

19 THE COURT: Well, the last thing I'm trying to do is  
02:44PM 20 get people more upset and get more contentious. But the cases  
21 you cited me, isn't it significant that those were common fund  
22 cases as opposed to this case where the attorneys' fees is paid  
23 separately from what's given to the plaintiffs?

24 MR. FRANK: No, Your Honor. In fact, the issue in  
02:45PM 25 all of these cases was that it was a separate fund. In

1 *Bluetooth* it was a separate fund, and that was called a red  
2 flag, 654 F.3d 935. *Inkjet*, separate fund. *Pearson vs. NBTY*,  
3 separate fund. *Redman vs. RadioShack*, 768 F.3d 822, separate  
4 fund.

02:45PM 5 The fact that every dollar you reduce the fees of  
6 the attorneys does nothing for the class is what makes the  
7 settlement unfair under Rule 23(e) because it's the attorneys  
8 negotiating a selfish gimmick provision for themselves to  
9 prevent a challenge to the fees. And that's why we're not here  
02:45PM 10 challenging the fees under Rule 23(h), we're here challenging  
11 the settlements under Rule 23(e) because of that provision,  
12 because of the disproportionality.

13 And I don't understand how he says we provided no  
14 alternative resolution when, just now, I provided an  
02:46PM 15 alternative resolution. If the attorneys want multi-million  
16 dollars in attorneys' fees instead of doing the bare  
17 constitutional and legal minimum for notice, they could have  
18 had additional notice to ensure money gets to the class.

19 And it's not true that that would outstrip the cost  
02:46PM 20 of everything. Because when we won *Pearson vs. NBTY*, it got  
21 remanded. And that's what they did because the Seventh Circuit  
22 said the attorneys don't get paid unless the class gets paid.

23 And what do you know? Suddenly the attorneys who  
24 said it's too hard to pay the class magically found a way to  
02:46PM 25 pay the class. And they did it exactly the way we suggested,

1 which is you go to the third-party vendors -- you go to Amazon,  
2 you go to Ralphs, you go to all these supermarkets that have  
3 records of what their consumers buy -- and you either give them  
4 notice or you make direct distributions.

02:47PM 5 You can actuarially throttle the number of claims  
6 one way or the other, and they chose to throttle it to reduce  
7 the number of claims to get Conagra to settle and to maximize  
8 the amount that they could -- of the settlement fees that they  
9 could get for themselves. And what's going to get delayed here  
02:47PM 10 is if there's an appeal and the Ninth Circuit reverses it in  
11 two years and says, "You should have considered the *Bluetooth*  
12 factors. You should have considered the disproportionality."

13 And once the settlement gets thrown out, they'll  
14 negotiate the same settlement, except the class will get  
02:47PM 15 6 million. They'll find a way to get \$6 million to the class  
16 to 99 percent of the class that didn't get anything under the  
17 current claims process, and the attorneys will get 2 million.  
18 And the reason they'll do that is because the same reason  
19 Conagra settled now, it's going to cost them more than  
02:48PM 20 \$8 million to defend the litigation. And so they're happy to  
21 pay that \$8 million, and they don't care how it's split up.  
22 And that's *Staten* [sic], that's *GM Trucks*, that's *Pampers*,  
23 that's *Pearson*. Courts recognize this. There's no collusion  
24 necessary. It's just two parties acting in their  
02:48PM 25 self-interest.

1 And the self-interest of the defendant is to get out  
2 as cheaply as possible. And the self-interest of the  
3 plaintiffs' lawyers is to create as much illusory relief as  
4 possible to justify as large a fee as possible at the expense  
02:48PM 5 of the class. And that inherent conflict of interest is what  
6 the Court is here to judge. And it's not the objector's  
7 burden, it's the parties' burden to prove the settlement is  
8 fair, reasonable, and adequate, and that the disproportion is  
9 justified.

02:48PM 10 We already heard from Conagra that they're not going  
11 to buy Wesson Oil again. So we know the injunction is  
12 worthless because it doesn't require them to do anything. The  
13 injunction is worth zero. So that doesn't justify the  
14 settlement.

02:49PM 15 I'm happy to answer any other questions Your Honor  
16 has.

17 THE COURT: I appreciate it.

18 What I'm going to do is take this under submission,  
19 and I'll get a decision out tomorrow.

02:49PM 20 MR. FRANK: Thank you, Your Honor.

21 MS. SPIVEY: Your Honor, can I clarify on the record  
22 that I have not represented what Conagra will or will not buy.  
23 I am not in-house counsel at Conagra, and so I don't make  
24 representations about what brands my client will or will not  
02:49PM 25 buy.

1 THE COURT: All right.

2 MR. FRANK: The transcript will speak for itself,  
3 Your Honor.

4 MR. LEVITT: An important clarification, Your Honor,  
02:49PM 5 as Mr. Frank came roaring up here saying that I miscited the  
6 case. He actually failed to look at the Westlaw cite in *Dennis*  
7 against *Kellogg*, which I can hand up in Footnote Number 2 of  
8 that cite, which is 2013 Westlaw 605- -- my eyes are bad. I'm  
9 getting old -- 6055326. In Footnote Number 2, it actually says  
02:50PM 10 as a corollary:

11 "When assessing the merits of an objection to  
12 a class-action settlement, courts consider the  
13 background and intent of objectors and their  
14 counsel particularly when indicative of a motive  
02:50PM 15 other than putting the interest of the class  
16 members first."

17 So as Mr. Frank wanted to say that my argument would  
18 somehow -- or the impropriety -- or the improper side of my  
19 argument should underscore my other points, I would say it's  
02:50PM 20 exactly the opposite. It is actually dead-solid perfect out of  
21 an opinion. The fact that, for some reason, he read some other  
22 opinion isn't our problem.

23 So the exact quote is 2013 6055326. If I'm  
24 incorrect, I would welcome Your Honor to ask Mr. Frank to come  
02:50PM 25 up here and say that I'm wrong again, which would make him 0

1 for 2.

2 THE COURT: I think -- I'm just not comfortable. I  
3 think I've heard enough.

4 MR. LEVITT: Okay. Thank you, Your Honor.

02:51PM 5 THE COURT: Okay.

6 THE COURTROOM DEPUTY: All rise.

7 **(Proceedings concluded at 2:56 p.m.)**

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*CERTIFICATE OF OFFICIAL REPORTER*

COUNTY OF LOS ANGELES )  
STATE OF CALIFORNIA )

I, DEBBIE HINO-SPAAN, FEDERAL OFFICIAL REALTIME COURT REPORTER, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: November 12, 2019

/S/ *DEBBIE HINO-SPAAN*

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